Supreme Court, U.S.
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No. 95-773

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM H. DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner violated 26 U.S.C. 7206(2) by causing his accountant to prepare false and fraudulent tax returns for petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unpublished, but the judgment is noted at 64 F.3d 660 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1995. The petition for a writ of certiorari was filed on November 15, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on seven counts of assisting the pre-

paration and presentation of his own and his corporations's false tax returns, in violation of 26 U.S.C. 7206(2).[1] He was sentenced to 15 months' imprisonment, fined $28,180.80, and ordered to pay restitution. The court of appeals affirmed petitioner's convictions but vacated the sentence and remanded for resentencing. Pet. App. 1a-12a.

1. Petitioner was the chairman, president, and 85% owner of Potomac Systems Engineering, Incorporated (PSE), a Virginia-based corporation. From 1986 through 1989, he skimmed hundreds of thousands of dollars from PSE by various means. Specifically, he submitted check request forms falsely indicating that he was seeking advances for travel or business deductions. He submitted falsified expense vouchers and receipts for entertainment for which he had purportedly paid cash. He had numerous PSE checks for $500 each drawn to the Crystal City Marriott, where he had check cashing privileges for up to $500. Finally, he had PSE checks drawn to various PSE employees, who in turn cashed the checks and turned the cash over to him. Pet. App. 3a.

The money that petitioner skimmed from PSE was falsely charged to a PSE "selling expense" account that was supposed to record advances to petitioner for cash expenses related to the development of PSE contracts with the Department of Defense. Pet. App. 3a. The money was not included in the Internal Revenue

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[1] Petitioner's corporation was convicted of filing false and fraudulent income tax returns, in violation of 26 U.S.C. 7206(1). On appeal, the court of appeals vacated the restitution order imposed on the corporation and remanded the case to the district court for further proceedings on the proper amount, if any, of restitution. Pet. App. 12a.

Service Form W-2 that petitioner received each year from PSE. Gov't C.A. Br. 6. Nor was it reported on petitioner's federal income tax returns for the years 1986 through 1989. Those returns were prepared by an accountant in Alabama, and petitioner failed to tell the accountant about the money he had skimmed. As a result of petitioner's conduct, his personal returns understated his adjusted gross income. In addition, PSE's returns for 1987 through 1989 overstated its selling expenses. Pet. App. 3a-4a.

2. The court of appeals affirmed petitioner's convictions under 26 U.S.C. 7206(2). Pet. App. 1a-12a. The court rejected petitioner's claim that Section 7206(2) does not apply to someone who assists the preparation of his own false return. Pet. App. 5a.[2] The court observed (*ibid.*) that the language of Section 7206(2) reaches cases in which the defendant aids in the preparation of his own false return.[3]

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[2] 26 U.S.C. 7206(2) prescribes a fine or imprisonment, or both, for anyone who

> [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document.

[3] In rulings that petitioner does not challenge in this Court, the court of appeals also rejected his arguments that venue was improper and that the jury instructions constructively amended the indictment. Pet. App. 5a-7a.

ARGUMENT

Petitioner challenges his convictions under 26 U.S.C. 7206(2) for assisting the preparation of his own false returns, contending that Section 7206(2) applies only to defendants who assist the preparation of someone else's false return.[4] The court of appeals correctly rejected that contention, and its unpublished decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

As the court of appeals determined, petitioner's conduct falls squarely within the broad language of Section 7206(2). Pet. App. 5a. Section 7206(2) applies to "any person" who "[w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation * * * of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter." 26 U.S.C. 7206(2); see *United States* v. *Griffin*, 814 F.2d 806, 809 (1st Cir. 1987); *United States* v. *Perez*, 565 F.2d 1227, 1233-1234 (2d Cir. 1977). Petitioner procured the preparation of false returns by, among other actions, falsifying check requests, expense vouchers, and receipts. Pet. App. 3a. That conduct led to false entries in PSE's records, including petitioner's Forms W-2, and to the under-reporting of petitioner's income on his returns for 1986 through 1989. *Ibid.*

Contrary to petitioner's contention (Pet. 5-8), Section 7206(2) is not limited to cases in which the defendant assists in the preparation of a false tax

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[4] Petitioner does not challenge his convictions under 26 U.S.C. 7206(2) for assisting the preparation of false returns for his corporation. See Pet. i, 3 n.2, 7.

return for someone else. The statute applies to "any person" who willfully assists the preparation of "a" materially false or fraudulent return (or other document). Petitioner errs in relying (Pet. 8) on language in Section 7206(2) providing that a person may be guilty of violating that provision "whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document." That language makes clear that the defendant *may be* someone other than the "person authorized or required" to file the return or other document. But it does not compel the conclusion that the defendant *must be* someone other than the "person authorized or required" to file the return or other document. Indeed, when Congress wished to include such a limitation, it did so through explicit language not found in Section 7206(2). See Pet. 14 n.7, quoting 26 U.S.C. 6701(a) (providing civil penalties for aiding and abetting the understatement of tax liability "of another person").[5]

Petitioner also errs in relying (Pet. 5-6) on the principle that one cannot aid or abet oneself in the commission of a crime. Section 7206(2) is not merely an "aiding and abetting" statute. See *United States* v. *Greger*, 716 F.2d 1275, 1277 (9th Cir. 1983), cert. denied, 465 U.S. 1007 (1984). Rather, it "delineates a substantive offense," *United States* v. *Griffin*, 814 F.2d at 809, that must be defined with reference to its

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[5] Petitioner errs in asserting (Pet. 12) that the decision below conflicts with *Achilli* v. *United States*, 353 U.S. 373 (1957). *Achilli* held that the defendant's filing of a false tax return was properly prosecuted as a felony under Section 145(b) of the Internal Revenue Code of 1939, rather than as a misdemeanor under a separate statutory provision. 353 U.S. at 375-379. That holding is inapposite here.

own elements, see *United States* v. *Perez*, 565 F.2d at 1233-1234 (setting forth elements of Section 7206(2)).

Petitioner points out (Pet. 7, 11) that other cases involving facts similar to those of this case have been prosecuted under Section 7206(1).[6] Petitioner acknowledges (Pet. 11), however, that at least one other court of appeals decision affirmed a conviction under Section 7206(2) on similar facts. See *United States* v. *Hirschfeld*, 964 F.2d 318, 321-323 (4th Cir. 1992), cert. denied, 113 S. Ct. 1067 (1993). Yet another is *United States* v. *Greger*, *supra*, in which the Ninth Circuit upheld the conviction under Section 7206(2) of a defendant who gave false information to his innocent tax return preparer.[7]

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[6] 26 U.S.C. 7206(1) prescribes a fine or imprisonment, or both, for anyone who

> [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties or perjury, and which he does not believe to be true and correct as to every material matter.

[7] Petitioner's attempt (Pet. 4-5, 11) to distinguish *Greger* is unavailing. Petitioner argues (Pet. 11), first, that Greger did not advance the same argument that petitioner has advanced in this case. Greger did argue, however, that, because his accountant was unaware that the information supplied by Greger was false, the government could not establish the existence of a guilty principal and, therefore, Greger could not be convicted under Section 7206(2). In rejecting that argument, the court stated that Section 7206(2) is "plainly broader" than "the traditional aider and abettor statute." *Greger*, 716 F.2d at 1277. That statement is equally applicable to, and requires the rejection of, petitioner's argument in this case, for reasons discussed in the text. Petitioner also suggests (Pet. 11) that *Greger* is distinguishable because, unlike petitioner, Greger did not sign the false return on which his conviction under Section

The fact that the government often charges cases involving similar facts under Section 7206(1) did not bar it from proceeding under Section 7206(2) in this case. When conduct violates more than one criminal statute, the prosecutor has broad discretion to proceed under any of the applicable statutes. See, *e.g.*, *Ball* v. *United States*, 470 U.S. 856, 859 (1985); *United States* v. *Batchelder*, 442 U.S. 114, 123-125 (1979). The prosecutor acted well within that discretion here. Petitioner's conduct went beyond subscribing to false returns. He falsified records and documents knowing that they would be used to create corporate records for PSE that would under-report the income he received, and knowing that those false records would be used in the preparation of tax returns for petitioner and his corporation. Compare *United States* v. *Cutler*, 948 F.2d 691, 696-697 (10th Cir. 1991); *Greger*, 716 F.2d at 1277; *United States* v. *Crum*, 529 F.2d 1380, 1383 (9th Cir. 1976).[8]

7206(2) was based. See *Greger*, 716 F.2d at 1276 n.1. The Ninth Circuit did not state or imply, however, that Section 7206(2) would have been inapplicable if Greger had signed the return. The court presumably noted that Greger had not signed the return merely to explain why he could not have been prosecuted under Section 7206(1).

[8] Moreover, to the extent that cases involving similar facts are seldom prosecuted under Section 7206(2), the question presented here lacks sufficient importance to warrant review by this Court. Contrary to petitioner's suggestion (Pet. 7), the government did not, in moving (unsuccessfully) to have the court of appeals publish its decision, suggest that the decision was worthy of review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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